United States Court of Appeals

for the Second Circuit

AMICUS BRIEF

No. 74-2191

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IN THE UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

COMMUNICATIONS WORKERS OF AMERICA, et al.,

Plaintiffs-Appellants,

v.

AMERICAN TELEPHONE AND TELEGRAPH COMPANY,
LONG LINES DEPARTMENT,

Defendants-Appellees.

On Appeal from the United States District Court
for the Southern District of New York

REPLY BRIEF FOR THE UNITED STATES EQUAL EMPLOYMENT OPPORTUNITY COMMISSION AS AMICUS CURIAE

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Some of the contentions raised by the Appellee in this case, as well as certain new developments in the case law concerning the issue presented by this appeal, require that the Commission file this reply brief.

1. The central thrust of the Appellee's position seems to be that pregnancy is unique to females and that, therefore, disabilities resulting from pregnancy may be treated uniquely. That

position misconstrues the issue in this case. This case concerns disabilities and whether the Appellee's exclusion of actual disabilities resulting from pregnancy has a disparate effect on females. Thus the Commission guidelines on "Employment Policies Relating to Pregnancy and Childbirth," 29 C.F.R. §1604.10(b), cited at page 27 of the Commission's original brief, require only that disabilities related to pregnancy be treated on the same basis as other disabilities under any employer's benefits plan. The guidelines are clear on their face that there is no requirement that pregnancy per se be treated as a disability, thus qualifying a female employee, merely on the basis of her pregnant status, to claim benefits.[1/] Title VII requires no preferential treatment for

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1/ Judicial determinations support the Commission's distinction between pregnancy per se, which is not disabling, and pregnancy-related disabilities. After a full trial and hearing medical testimony from several experts on the issue before this Court, Judge Merhige found in Gilbert v. General Electric Company, 375 F.Supp. 367, 376 (E.D. Va. 1974), appeal pending Fourth Circuit No. 74-1557, that although pregnancy per se is not disabling, certain conditions related to pregnancy -- most notably labor and delivery -- are disabling. Accord: Wetzel v. Liberty Mutual Insurance Company, 372 F.Supp. 1146 (W.D. Pa. 1974), appeal pending Third Circuit No. 74-1233.

One district court to confront this issue has mistakenly read the Commission guidelines to mean that pregnancy per se is a sickness or disability entitling pregnant women to disability benefits as a matter of law. Newmon v. Delta Airlines, 374 F.Supp. 238 (N.D. Ga. 1973). The correct understanding of the Commission's position is that certain disabilities are associated with pregnancy, and the employer is required to pay disability benefits to a pregnant employee only when she is in fact disabled and unable to perform her normal work.

Since the Newmon Court apparently failed to perceive the essential distinction made by the guidelines—between pregnancy per se and actual disabilities related thereto—the Commission submits that its decision that the exclusion of pregnancy disability from a benefit plan did not violate Title VII merits little consideration.

the pregnant employee regarding disability benefits; it does mandate the same treatment for the employee disabled by pregnancy as that afforded her co-worker disabled by any other cause.[2/]

The Commission guidelines and the judicial decisions supporting those guidelines reflect the view that, whether or not pregnancy is considered a normal biological condition rather than an illness or injury, in the employment context it is a disability no different in kind from any other disability in relation to the inability of the woman involved to carry on her normal work and earn her normal wages. Indeed, pregnancy-related disabilities exhibit the same characteristics as other disabilities: loss of income due to temporary inability to perform one's job, medical expenses, hospitalization, and possible death.[3/] Moreover, pregnancy-disability is inextricably sex-linked, so that differential treatment of such disabilities in the employment context inevitably has a disparate and disadvantageous impact on working women.

The Company's contention that pregnancy is somehow unique and the female worker disabled by pregnancy has no male counterpart is thus erroneous. A woman disabled by pregnancy so that she is unable

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2/ Thus, if an employer does not have a temporary disability benefits plan for any disabilities, no special coverage for pregnancy-related disabilities is required.

3/ Childbirth and Child Rearing Leave: Job-Related Benefits, 17 N.Y. Law Forum, 480, 483 (1971), Elizabeth Duncan Koontz, Dir., Women's Bureau, U.S. Dept. of Labor.

to perform her normal work has a counterpart in a male co-worker disabled by any other cause, whether it be sex-related, such as a prostatectomy, or wholly non-sex related, such as an appendectomy or broken leg. 4/

4/ Appellee apparently recognizes the force of this contention by asserting, without proof, that there are factual differences between disabilities caused by pregnancy and other disabilities. (Appellees brief, p. 15). Of course, the consideration of any such possible factual differences is inappropriate, and indeed impossible, at this stage of these proceedings.

Nor is it intuitively obvious that the factual distinctions to which Appellee alludes actually exist. There has been no showing, for example, that the cost to an employer of covering disabilities resulting from, for example, drunken driving, lung cancer, or heart attacks, all of which might perhaps be shown to disproportionately affect males, is any less than that of covering pregnancy disabilites. Nor is there any showing that the rate of failure to return from pregnancy disability is higher than from other disabilities. In addition, there is no showing that costs from such non-return could not be recovered.

Furthermore, the reference to voluntariness merely raises interesting philosophical speculations, the relevance of which are not immediately apparent. For example, is lung cancer voluntary? Are disabilities resulting from drinking? Or from skiing?

2. Appellee responds to the assertion that Title VII requires that its disability benefits policy be held invalid because it has a disparate effect on females in two ways: 1) by asserting that the Supreme Court in Geduldig v. Aiello, __U.S.__, 94 S.Ct. 2485 (1974), measured disparate effect in terms of "aggregate risk protection" (Appellee's brief, p. 14); and 2) by suggesting that, in any event, the Court seems to have abandoned such a disparate effect analysis in Espinoza v. Farah Manufacturing Co., 414 U.S. 86 (1973), and McDonnell Douglas v. Green, 411 U.S. 792 (1973) (Appellee's brief, pp. 12-13). However:

a) As set forth in the Commission's main brief (pp. 15-26), the Court seems quite clearly to have referredto "aggregate risk protection" in Aiello because it was unwilling to impose more strigent requirements on a State, where i) it is not yet firmly established that discrimination on the basis of sex will in all circumstances[5/] be subjected to the same 14th Amendment strict scrutiny requirements imposed where there is discrimination on the basis of, for example, race, and ii) in light of the traditional latitude allowed States to address problems one step at a time,

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5/ See the Supreme Court's decision this past term in Kahn v. Shevin 94 S.Ct. 1734 (1974), applying the rational basis standard to uphold the constitutionality of a Florida property tax exemption for widows, but not widowers, against an equal protection challenge.

particularly when they are complex in nature. As indicated by the decisions discussed, infra, (pp. 7-10) far more stringent requirements may be imposed both on private employers, and on the States, by Congressional enactments such as Title VII.

b) It is apparent from Appellee's own discussion of Espinoza v. Farah Manufacturing Co., 414 U.S. 86 (1973) (Appellee's brief, p. 18), that the Supreme Court there held that discrimination on the basis of alienage did not constitute discrimination on the basis of national origin within the meaning of Title VII because to so hold, the Court reasoned, would conflict with the intent expressed in other Congressional legislation. With respect to the kind of pregnancy disability benefits policy which Congress has endorsed, see the Railroad Unemployment Insurance Act, 45 U.S.C. §351 (k)(2), establishing precisely the form of pregnancy disability coverage which both the Appellants and the Commission contend is required under Title VII.

Furthermore, McDonnell-Douglas Corp. v. Green, 411 U.S. 792 (1973), simply does not speak to the issue of what constitutes discrimination against a class, since no discovery of evidence which might have established such discrimination had been allowed by the trial court. Indeed the Court directed that such discovery should be allowed. See 411 U.S. at p. 800.

3. Appellee relies on the fact that, at the time its brief was filed, it was not aware of authority holding that different standards must be applied in evaluating a pregnancy disability benefits policy under Title VII than under the Fourteenth Amendment. Since that time a number of courts have reached precisely that conclusion.

a. In assessing an employment policy challenged under Title VII which permitted paid sick leave to employees temporarily disabled by any cause except pregnancy, childbirth, or recovery therefrom, a federal district court for the Northern District of California held that Title VII "flatly prohibits the type of sex discrimination practiced by the [school] District." Vineyard v. Hollister School District, 8 FEP Cases 1010, 1011 (N.D. Cal. 1974). In finding that the Commission's guideline on pregnancy disability merited great deference from the Court (citing Griggs v. Duke Power Co., 401 U.S. 424 (1971)), the Court reasoned that subjecting only pregnant employees to the exclusion of benefits "flies in the face of the E.E.O.C. guidelines and, therefore, violates the mandate of 42 U.S.C. §2000e, et seq."

The Vineyard Court found that a Title VII action for pregnancy disability benefits was clearly distinguishable from Aiello because, supra, at 1012:

> Title VII is a congressional enactment that addresses the problems of employment discrimination based on sex and race more specifically than the broad mandate of the Equal Protection Clause of the Fourteenth Amendment. Congress has the power to pass appropriate legislation to implement the dictates of the Equal Protection Clause. The implementing legislation may reach more broadly than the Equal Protection Clause itself....

In noting that Congress intended Title VII to be such a broad implementing legislation, the Vineyard Court also reasoned that in a Title VII action, "the Court does not have to go through the balancing process followed by the Supreme Court in Geduldig," supra, at 1012.

b. Another federal district court, in finding unlawful the denial of sick leave days only to employees disabled by pregnancy, reasoned that under Title VII, "Congress has established a standard for testing employment discrimination that goes beyond the standard of "reasonableness" traditionally applied to the States under the Equal Protection Clause of the Fourteenth Amendment". Satty v. Nashville Gas Company, slip opinion, pp. 7-8, No. 74-288-NA-CV (M.D. Tenn. November 4, 1974). The Satty Court ruled that there

are at least two classifications of sex discrimination cases: those arising under the Equal Protection Clause of the Fourteenth Amendment and those arising under Title VII. The Court then stated, supra, at p. 10:[6]

> These two categories involve the application of different standards for the determination of whether distinctions based on sex are permissible. (emphasis supplied).

c. The highest court for the State of New York has ruled in an unanimous decision that an employer's denial of sick leave to a woman disabled by pregnancy on the same basis as it would be available if she were suffering from any other temporary disability violated the State Human Rights Law forbidding discrimination based on sex. Union Free School District v. New York State Human Rights Appeal Board, slip opinion, No. 505 (Ct. of App. N.Y. November 21, 1974).[7] In finding that whether such an employment policy may not

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6/ The Satty Court read the Aiello opinion to recognize that the challenged California statute discriminated on the basis of sex, but to find that discrimination permissible under the Fourteenth Amendment. The Satty Court also found that the Aiello majority's rejection of the Dissent's argument that Title VII standards should be applied to this Fourteenth Amendment Action "does not rationally suggest that the standard established under Title VII is weakened or in any way diminished in a case properly brought under the Civil Rights Act of 1964," Satty v. Nashville Gas Co., supra, p. 11.

7/ Copies of this decision have been submitted to this Court by the New York State Division of Human Rights.

be unconstitutional was irrelevant, the Court reasoned that there was a recognized distinction between "constitutional proscription and statutory interdict", supra, at p. 2. The Court noted that federal courts have, in several instances, notably in the area of protective labor legislation for women, found classifications permissible to lawmakers under the Equal Protection Clause but forbidden to employers under Title VII, supra, at p. 3.

4. Appellee recognized, as it must, that the Commission's interpretations of Title VII are entitled to great deference unless there are compelling indications that such interpretations are wrong. (Appellee's brief, pp. 17-19). Appellee also recognizes that such deference must be accorded even where such an interpretation is issued some time after the legislation which is being interpreted was enacted (Appellee's brief, p. 26). Nevertheless, Appellee argues that the Commission interpretation in question here is not entitled to judicial deference because the Commission's approach to the problem has been an evolving one (Appellee's brief, pp. 20-21).

Although relying heavily on Espinoza v. Farah Manufacturing Co., 414 U.S. 86 (1973), Appellee fails to note that the Commission's guideline in that case had also evolved over a period of time. Appellee also fails to note that the Supreme Court in Espinoza did grant deference to the Commission's guideline. Although departing

from the Commission's interpretation of its Guidelines on Discrimination Because of National Origin in one narrow respect, the Court took pains to emphasize that it did not question the general validity of those guidelines. Moreover, the Court departed from the Commission's interpretation only because there was legislative action by Congress in enacting other statutes requiring federal employees to be citizens of the United States. Because of this statutory bar to the federal employment of aliens, the Court found compelling reason to believe that Congress did not intend the term "national origin", within the scope of Title VII, to embrace similar, privately instituted citizenship requirements.

Appellee points to no such contrary expressions of Congressional intent concerning the issue in question here. Indeed, as indicated supra at p. 6 , the only Congressional enactment which addresses the question of federal pregnancy disability benefits policy of which we are aware is perfectly consistent with the Commission's guideline at issue in the instant case.

Evolving positions in an area as complex as employment discrimination are to be expected. Indeed, in enacting the 1972 Amendments to Title VII Congress recognized as much in admitting that its very perception of the nature of employment discrimination

had evolved.[8] Furthermore, it was in large part because of this Congressional recognition that the Commission, as an expert agency, was granted additional powers.[9]

With respect to the area of pregnancy, the Commission adopted its present position only after it studied the practices that adversely affected women in employment and determined that the most consistent bar to women's advancement was discrimination against them on the basis of their childbearing function. In the years after the passage of the Title, through court cases and employee charges of sex discrimination brought before it, the Commission became increasingly aware of the multiplicity of discriminatory practices to which women were subjected because of their childbearing function, ranging from pre-employment inquiries as to family planning intentions to pregnancy discharge. (For a full discussion of the numerous employment policies which have discriminated against women because of their childbearing function or potential, see the Commission's main brief, pp. 5-14). This information provided the Commission with a sound factual basis for its determination that pregnancy could not be used as a bar to a woman's equality of employment opportunity, whether it be hiring decisions or entitlement to benefits.

8/ See remarks of Senator Williams contained in Senate Committee Report to Equal Employment Opportunity Act, Senate Report No. 92-415 92nd Cong., 1st Sess., p. 5, cited in Commission main brief, pp. 29-30

9/ Id., at pp. 4-8.

In the Commission'f first annual report to Congress for Fiscal Year 1965-66, p. 40, the Commission made clear that to carry out the Congressional policy of providing truly equal employment opportunity for women, policies must be devised which afford women job protection during periods of pregnancy. In the Commission's Fourth Annual Report to Congress, p. 13, the Commission informed Congress that it had determined that equality of employment opportunity for women required an employer to grant women a leave of absence for pregnancy whether or not the employer grants such a leave for illness. Finally, in the Commission Sixth Annual Report to Congress, p. 17, [10/] the Commission notified Congress of its determination that the employer's failure to compensate pregnancy disability when it compensated all other disabilities was violative of the Act. Thus, the Commission's evolving position reflects a growing perception of the numerous discriminatory policies imposed on women because of pregnancy.

10/ Appellee properly points out (Appellee's brief, p. 21, n. 56) that we erred in our original brief in this case concerning the date that this report was transmitted to Congress. It was in fact transmitted a few days after the date of the passage of the 1972 amendments to Title VII. At the time that our original brief was filed this error had not been brought to our attention in the Gilbert v. General Electric action to which Appellee refers due to the defendant's failure in that action to serve the Commission with its brief. We regret our error.

We submit that the soundness of the Commission's interpretation in its guideline that the differential treatment of pregnancy disability is violative of Title VII is not diminished simply because the Commission's guideline was the product of a great deal of thought and experience.[11/] Indeed, every court but one which has considered the propriety under Title VII of excluding only pregnancy disabilities from benefits coverage has adopted the Commission's position.[12/]

In the final analysis no other conclusion comports with common sense and the egalitarian mandate of Title VII. To deny employment benefits only pregnancy-related disabilities necessarily penalizes women and only women. Such inferior treatment accorded sex-linked disability constitutes sex discrimination in violation of Title VII.

11/ Of course, the publication and issance of the Commission's guideline on pregnancy disability did not establish a new policy of liability for a previously benign employment practice. Rather, the guideline gave the public, and particularly employers, notice of the Commission's interpretation of Title VII. An employer's failure to treat pregnancy disabilities comparably with other disabilities was violative of the Act from its effective date (July 2, 1965).

12/ In addition to the post-Aiello decisions cited and discussed supra at pp 7-10, the specific guidelines at issue in the instant case (24 C.F.R. §1604.10) have been upheld by at least the following courts Gilbert v. General Electric Company, supra; Wetzel v. Liberty Mutual Insurance Company, supra; Dessenberg v. American Metal Forming Co., 8 FEP Cases 290 (N.D. Ohio 1973); Hanson v. Hutt, No. 42826 (S.Ct. Wash., Dec. 21, 1973); Scott v. Opelika City Schools, 8 FEP Cases 272 (M.D. Ala. 1974); Farkas v. School District, 8 FEP Cases 289 (S.D. Ohio 1974). Contra, Newmon v. Delta Airlines, 374 F.Supp. 238 (N.D. Ga. 1973).

CONCLUSION

For all the reasons discussed above, and for all the reasons given in the Commission's original brief, we respectfully request that the decision below be reversed and the case remanded for further proceedings.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing Reply Brief of the United States Equal Employment Opportunity Commission as Amicus Curiae have been forwarded this day by pre-paid postage to the following counsel of record:

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